

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT and LICENSE NO. 492 610
Issued to: George W. Jahn Z-27 076

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2244

George W. Jahn

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 23 May 1980, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's license for three months on twelve months' probation, upon finding him guilty of negligence. The specifications found proved allege that while serving as Pilot on board SS CORNUCOPIA under authority of the license above captioned, on or about 8 December 1979, while said vessel was enroute from San Francisco to Stockton, Appellant failed to properly maintain control of said vessel, resulting in CORNUCOPIA's colliding with and damaging Beacon #11 (LLNR891) an established U.S. aid to navigation; and that while serving as aforesaid, did fail to properly maintain control of said vessel resulting in its grounding.

The hearing was held at San Francisco, California, on 6 and 28 February and 7 and 14 March 1980.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced in evidence the testimony of two witnesses and twenty exhibits.

In defense, Appellant offered in evidence his own testimony and the testimony of another witness.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and both specifications had been proved. He then served a written order on Appellant suspending his license for a period of three months on twelve months' probation.

The entire decision was served on 26 May 1980.

Appeal was timely filed on 28 May 1980 and perfected on 23

September 1980.

FINDINGS OF FACT

On 8 December 1979, Appellant was serving as Pilot on board SS CORNUCOPIA and acting under authority of his license while the vessel was underway from San Francisco, California, to Stockton, California.

SS CORNUCOPIA, O.N. 590414 is a permanently enrolled tankship, licensed for the coasting trade. The vessel is 590.8 feet long, 90 feet in breadth, with a registered depth of 54.6 feet.

On the date in question, Appellant boarded the vessel at 0459 to pilot it from Anchorage No. 7, San Francisco Bay, to the Port of Stockton. Although fog delayed the journey somewhat, by 1151 the vessel made Antioch Point and entered the Stockton Deepwater Channel in the San Joaquin River. Controlling depths for the ship route are thirty (30) feet on the centerline of the four hundred (400) foot wide channel and 28 feet on the channel edges. Appellant had traversed this area numerous times before, and had piloted CORNUCOPIA many times since the vessel's going into service.

On entering the channel, Appellant directed full ahead, 70 RPM, which generated a speed over the ground of 8 of 9 knots. The tide was ebbing at about 1 1/2 to 2 knots as the vessel proceeded into the ebb. At the time, CORNUCOPIA's mean draft was 28 feet, 11 1/2 inches.

Two minor course alterations to the left were made without incident. At 1158, the vessel neared the east end of West Island, where the pilot intended to shape course to the right for the Antioch Bridge. Before the turn was initiated CORNUCOPIA sheered to port. Appellant ordered speed reduced to half ahead and the rudder to be put hard right. At about 1159 he ordered full ahead, which successfully checked the swing to port but caused the vessel to transfer to the left side of the channel and fetch up against Beacon 11, an established aid to navigation. At about 1200 the vessel contacted and submerged the beacon, and went hard aground. About 2 1/2 hours later, with the aid of a small tugboat, the vessel broke free and completed the voyage without further incident.

Pilots in the area, as well as Appellant, were aware that vessels had encountered sheer problems in the vicinity of this incident. It was also known to them that the strong head current at the east end of West Island would strike the starboard bow of an inbound vessel, rendering it difficult to execute a turn to the

right and compounding any sheer to the left which might be experienced. Appellant was cognizant of the fact that bank suction increases proportionately with the speed of a vessel.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge.

The asserted grounds for appeal, in logical order, are:

- (1) The Coast Guard lacked jurisdiction over Appellant;
- (2) Application of a presumption of fault was improper absent a showing that "no fault" causes of the incident were ruled out;
- (3) Even if application of the presumption was proper, the preponderance of evidence indicates Appellant was free of fault;
- (4) The Administrative Law Judge erred in his vigorous questioning of Appellant.

OPINION

I

Counsel's construction of Appeal Decisions Nos. 2204 and 2224 is so strained as to exceed the bounds of legitimate advocacy. Appellant cites those decisions for the proposition that "...the Coast Guard's jurisdiction re pilotage does not extend above New York Point." Neither of the decisions as support for the assertion bears more than the remotest relationship to the present case, and they have no bearing whatsoever on the proffered "rule of law." Appeal Decision No. 2204 involved a vessel sailing under register and therefore not required to carry a Federal pilot under R.S. 4401 (46 U.S.C. 364). Thus the authority to regulate the pilot in that case was in the hands of the State, which did regulate the pilot's action pursuant to its retained authority. 46 U.S.C. 211. The geography of California harbors and their tributaries was immaterial to the decision.

Appeal Decision No. 2224 involved a foreign flag merchant vessel under state pilotage control. Under 46 U.S.C. 211, the Coast Guard is precluded from interference with state regulation of pilots on such vessels. The case is utterly inapposite in the present situation.

The mis-citation of authority aside, 46 USC 364 provides that every coastwise seagoing steam vessel not sailing under register shall be "under the control and direction of pilots licensed by the Coast Guard," when not on the high sea. Thus, in effect, "[t]he federal government has assumed exclusively authority over the regulation of pilots on enrolled vessels." Jackson v. Marine Exploration Co., Inc., 583 F.2d 1336 (5th Cir. 1978) (emphasis added.) It was established on the record that CORNUCOPIA is permanently enrolled and licensed for coastwise trade. Transcript at 15; I.O. Exhibit 3. The jurisdiction of the Coast Guard is unassailable in this case.

II

Appellant notes in his brief that an appeal to the National Transportation Safety Board, pending at the time the brief was written, questioned the use of a presumption against a pilot in cases of allisions or groundings. Appeal Decision No. 2173 established that a rebuttable presumption of negligence does arise when a vessel allides with a fixed objects or grounds on a charged shoal. The National Transportation Safety Board affirmed the decision. See NTSB Order EM-81, _____ NTBS _____ (1980).

The permissible presumption was properly raised by the evidence of allision and grounding. It is not necessary that every conceivable explanation for an event be rebutted by the Investigating officer in order to make his case. The regulatory standard of proof is adequately addressed in 46 CFR 5.20-95(b). In order to negate the presumption, Appellant was obliged to go forward with evidence. The testimony offered by an expert witness established that some degree of shoaling at the channels edge had occurred, beyond the degree already indicated on the chart. He also noted that the local Pilots were familiar with the bank suction in that area and knew some caution was required. I do not find that this testimony rebutted the presumption. Rather it effectively established that Appellant was on notice of a hazardous locale, and no evidence presented by the Appellant tended to negate the Pilot's negligent handling of the vessel which culminated in the allision and grounding.

III

As noted above the standard of proof in R.S. 4450 proceedings is not tested by the "preponderance of the evidence" rule suggested by Appellant. In this regard, a review of all the testimony of the expert witness, the statement of the vessel's Master, and Appellant's own testimony tends to support the conclusion that bank suction had a role in this accident. Speed, draft, and proximity to the bank all affect the strength of bank suction. Since

Appellant was aware of this phenomenon in the precise area in which it occurred, and was familiar with both the route and the vessel from extensive prior experience, I do not find that the specter of gradual accretion of material leading to a shoal at less than control depth on the edge of a channel to the extent described by the expert was sufficient to rebut the presumption. The expert testified that shoaling had occurred to the extent that the depth was reduced such that "it is 27 feet or something like that." Transcript at 63. Since the control depth at channel edge is 28 feet the significance of the shoaling is not of such magnitude as to overcome the totality of the evidence presented. I.O. Exhibit 5 (Chart 18661, Note on Stockton Deepwater Channel). In light of the know propensity for sheering to occur in that area if pilots allowed a vessel to get too close to West Island, the expert's testimony that the shoaling could have contributed to the event, and Appellant's testimony that "maybe she took a little suction on the starboard side", not only left the presumption intact but supplied substantial and reliable evidence that Appellant was negligent is not proceeding cautiously in that area. Transcript at 56, 63-4.

IV

An Administrative Law Judge has an affirmative duty to insure that all relevant facts are elicited at an R.S. 4450 proceeding. 46 CFR 5.20-1(a). In order to do so he is specifically authorized to question witnesses at any time. 46 CFR 5.20-90(a). In this case, the Administrative Law Judge frequently solicited clarification of the evidence from both the Investigating Officer and Appellant's counsel. In addition, he asked questions of both Appellant's expert and Appellant. His questions were appropriate to elicit information that was relevant and material to the issue in controversy. See generally Appeal Decision No. 2013 (questions by Administrative Law Judge eliciting information unfavorable to Appellant does not indicate bias or prejudice). Once Appellant took the stand in his own behalf he was subject to all legitimate questions surrounding the cause of the incident. I also note without comment that Appellant's response to the Administrative Law Judge's question concerning the cause of the incident closely parallels Appellant's statement in the Transcript at 46, while testifying on direct examination by his own counsel.

CONCLUSION

The decision and order of the Administrative Law Judge are founded on substantial evidence of a reliable and probative character.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 23 May 1980, is AFFIRMED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
Vice Commandant

Signed at Washington, D.C., this 28th day of April 1981.